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ABSTRACT

Since the ratification of the United Nations Convention on the Rights of the Child by all Latin American countries, many substantial national legislative reforms have been made that reflect the spirit and the letter of the new Convention. This series of essays documents the challenges faced by countries beginning the process of legislative reform, and maintains that this challenge concerns establishing a new culture as well as legislation and that it must be concerned with all children and adolescents without exception. The essays focus on experiences in Argentina, Brazil, and Uruguay and are titled as follows: (1) "Child Legislation in Latin America: Models and Trends"; (2) "Reforms of Child Policies in Latin America: The State, Non-Governmental Organizations and the Judiciary"; (3) "Child Control by Social and Penal Institutions"; and (4) "Child Rights in Brazil: Children and Violence." Contains 72 references. (KB)

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CHILD RIGHTS IN LATIN AMERICA
FROM 'IRREGULAR SITUATION' TO FULL PROTECTION

Emilio García Méndez

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CHILD RIGHTS IN LATIN AMERICA

From 'irregular situation' to full protection

by
Emilio García Méndez

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the policies or views of UNICEF

Emilio García Méndez, Santafé de Bogotá

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PREFACE

Since the ratification of the UN Convention on the Rights of the Child by all countries in Latin America, many substantial legislative reforms at the national level have been made which reflect both the spirit and the letter of the new Convention. The information and experiences documented here reflect the challenges faced by countries beginning the process of legislative reform.

Latin America has been characterized by the concept of children in 'irregular situations', and the process of legislative reform will require much more than the simple formulation of new child legislation. Indeed, we are facing the challenge of establishing not only new legislation but a new culture. Significantly, this culture and legislation must be concerned not only with the protection of disadvantaged, deprived, abandoned and delinquent children, but with all children and adolescents without exception. Children must be seen as people with rights, and the relationship between the child and the rest of society must fundamentally change.

The United Nations' principle of full protection applies to children all over the world. This approach covers all individual and collective rights of new generations, and gives every child and every adolescent the power to demand his or her rights. For adults, this approach signifies the need to adapt the rules of a democratic society to ensure they work on behalf of children.

It is not a simple nor an easy task. It requires a clear and concerted effort involving the judiciary, the government and civil society. Legislative changes are therefore necessary, but they are not enough. For the Convention to become reality requires extensive and profound institutional reform, and a notable quantitative and qualitative improvement in basic social policies. If there is no significant effort to train all those involved in child assistance, the deficiencies passed on from previous legal and administrative cultures will continue to persist and influence the new model.

These articles offer a view of the region at a time when the UN Convention was being widely introduced. They were written by one of the Convention's most zealous promoters. As the organizer of the 'Pibes Unidos' and 'Gurises Unidos' programmes in Argentina and Uruguay, as UNICEF Project Officer in Brazil, and now as Regional Adviser on Child Rights at the UNICEF Regional Office for Latin America and the Caribbean, Emilio García Méndez is undertaking a crucial role. His mission is to support national initiatives for the implementation of the Convention, and help make it a reality for the children and young people in our region.

I am deeply honoured to present *Child Rights in Latin America* to those committed to the cause. More than simply a manual to disseminate information on the subject, these essays are a symbol of the struggle and effort of all those who are willing to work towards the changes that the future of Latin America and the Caribbean urgently requires.

Marta Maurás
Regional Director, UNICEF Office
for Latin America and the Caribbean
1994

INTRODUCTION

The essays presented here mark, to some extent, the end of a cycle that began in 1987. The chronological order in which they were written has been deliberately altered. Moreover, all the articles in this volume have been previously published in magazines or bulletins with different readerships.

With the exception of the purely historical sections, all the essays reflect first-hand experience that began in Argentina and Uruguay and continued during my stay in Brazil which lasted almost four years. The fact that I witnessed, and modestly participated in, the process of social mobilization in support of the Brazilian Children's and Adolescents' Act has had a major impact on the views expressed here. They are the result of having had the privilege of spending a number of years working with one of the leading academic figures on child rights in the region, Antonio Carlos Gomes Da Costa. It was his lucidity and overwhelming judicial sensitivity that motivated me to attempt to debunk the myths surrounding child rights in Latin America. Indeed, the Utopia proposed in this book has evolved from the various ways in which countries in the region have begun to substantially reform their national legislation to reflect both the letter and the spirit of the UN Convention on the Rights of the Child. Since these essays were written all countries in the region have ratified the Convention and significant progress has been made. It should be noted, therefore, that this collection of essays reflects the reality of the period in which they were written.

Nevertheless, I am conscious of the fact that, while the legislative reform process is under way in almost all countries in the region, the most difficult stage has only just begun. Any improvement in the current conditions of our children requires an incredible amount of thought and action. Future change will depend on the elimination of preconceptions and, more importantly, of facile rhetoric.

In Latin America, 'public' and 'State' were for a long time considered to be synonymous. Although the struggle for the restoration of democracy removed this misconception, we are still paying the price for it. Today, we are witnessing the rediscovery of what is 'public', recognising the conflicting link between the State and civil society. The positive results of this new approach are just beginning to be appreciated.

Emilio García Méndez
Santafé de Bogotá
July 1994

I. CHILD LEGISLATION IN LATIN AMERICA: MODELS AND TRENDS

Each country in Latin America has its own laws for children; however, there is little benefit in a country by country analysis since all child legislation in the region has evolved from the same concept - that of the 'irregular situation'[1]. This essay examines the models and trends in child legislation, and focuses on the important distinction between laws produced before and after the entry into force of the United Nations Convention on the Rights of the Child (hereafter referred to as the Convention). It then examines the challenges of implementing the Convention for countries with legislation based on the concept of the 'irregular situation'.

Legislation based on the theory of children in 'irregular situations'

The history of legislation based on children in 'irregular situations'

Until the early 20th century there were no specific judicial measures for children and adolescents in Latin America. The only difference between the treatment of children and adults was that established by the essentially retributive criminal codes of the 19th century. This legislation covered the reduction, by one third, of the punishment for offenders under 18 years of age. Analysis of the legislation shows that civil laws were almost non-existent prior to the Convention and that legislation relating to children was strictly penal in its nature (InterAmerican Institute for Human Rights, 1984, Mendez & Carranza, 1992).

The punishment meted out to children usually involved the deprivation of liberty, and adults, children and adolescents were all indiscriminately detained in the same institutions. Conditions were deplorable and promiscuity among adolescents and children was rife. By the beginning of the 20th century, growing awareness of these conditions, and the backdrop of a global prison reform movement (which began in the United States of America at the end of the 19th century), sparked moral indignation across the continent and gave rise to a significant Latin American prison reform movement.

The calls for reform resulted in legislation that was enacted across Latin America in the 1920s and 1930s. However, as the concern of the reformers was primarily directed against the excesses and promiscuity in prison, rather than the practice of depriving children of their liberty, the new laws almost with exception continued the practice of placing children in institutions. This tendency to institutionalisation was, in fact, a euphemism to describe the indefinite deprivation of liberty. The aim of the new laws was to 'protect' children in 'irregular situations' - described in the legislation as those who were 'supposedly abandoned' and 'presumably delinquent'. It endorsed unlimited state intervention to 'dispose of' those juveniles who were either materially or morally abandoned. The use of the terms 'supposedly' and 'presumably' show that there was no legal protection to prevent a child from being declared abandoned simply because he or she had no material resources (Bisig & Laje, 1989). This legislation violated practically all the basic principles of liberal law, and allowed arbitrary state intervention.

In essence, children who were protected by basic services such as health and education were being separated from those who were not. This resulted in two classifications: 'children and adolescents' (those whose basic needs were being satisfied) and 'minors' (those whose basic needs were not, or were only partially, being met). This latter category of children comprised those who were viewed as being in 'irregular situations'. The division of children into these two imprecise pseudo-sociological categories demonstrates that they were regarded simply as objects for state intervention, rather than true legal subjects entitled to certain rights and guarantees.

The awareness of children excluded from basic social protection rose dramatically in the 20th centu-

[1] This concept is outlined in detail in this essay, but in essence it assumes a radical division between two categories of children: 'children and adolescents' who are protected by social policies and whose basic needs are being met, and 'minors', those children in 'irregular situations' who are deprived of their basic needs for family, schooling etc.

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ry as reformers made more people aware of the dangers facing children who lived in poverty. This call for legislative reform, however, resulted in attempts to simultaneously address the need for compassionate assistance, as well as satisfy the more urgent demands for order and social control. This led to the development of an ideology of 'compassion-repression' in which children can only be offered protection after some form of incapacity has been declared (e.g. that their parents are unfit to care for them).

Juvenile court judges became the central focus for administering this legislation, and were endowed with both protective and punitive authority. Given the reasons for the distinction between the two categories of children, their role was essentially to deal with the effects of structural deficiencies in societies which had failed to make basic services universally available. It is therefore not surprising that this new approach faced opposition, and its implementation was far from consistent. In particular, the medical community was strongly opposed to using legal solutions to tackle social problems, as at this time they believed that social conflict was related to genetic differences between social classes (i.e. a medical problem) - something which the judge and juvenile court were clearly incapable of tackling.

The special laws for children, and, to a lesser extent the special courts, were a compromise between the legal and medical approaches. But they were a compromise with negative outcomes. Firstly, at an institutional level, the new ideas were inadequately implemented. The establishment of juvenile courts - the logical consequence of the creation of juvenile legislation - was so small-scale that the role of these tribunals was purely symbolic. Their lack of effectiveness was then attributed to bureaucratic and administrative shortcomings. Secondly, action by the juvenile courts became even more arbitrary. In contemporary law, judges are presented as anything but arbitrary or discretionary, their task is to resolve conflicts impartially according to the law. In cases where law is based on the concept of the 'irregular situation', however, the role of juvenile judges is exactly the opposite, they are the institutional embodiment of the 'compassion-repression' ideology. With absolute discretion invested in the judge, it is technically impossible for him or her to violate the law. While a total disrespect for rights and guarantees (even those safeguarded by the Constitution) had traditionally been seen in the application of laws to adults from society's more vulnerable groups, it now appeared as a formal provision in the new legislation for children. One example of this removal of basic rights and guarantees can be seen in the issue of detention. All Latin American countries have constitutions which include stipulations about the detention of citizens, but no law relating to children ever translated this guarantee into specific legislation. In addition, so little importance was given to the matters over which the judge presided that it was seen as unnecessary for there to be a higher reviewing body.

The economic crises of the 1930s-1960s revealed to an even greater extent the target of the new legislation. In 1930 the world economic downturn caused fiscal crises across Latin America which resulted in an increase in the number of 'minors' and a decrease in the number of 'children and adolescents'. In the absence of resources to tackle the problems of the lack of universal basic services, the problems facing children in poverty became criminalized. This is supported by research in eighteen Latin American countries which found that three-quarters of the cases heard by the courts involved young males more than four years behind in school, who, for the most part lived in poor areas of towns and cities.

Against this background, the purely symbolic role of the juvenile judges became even more apparent. During the 1940s and early 1950s, distributionist policies resulted in a dramatic increase in the extent and quality of basic services, with the state taking over many of the old welfare centres which had been run by the church, effectively integrating private social assistance programmes into public policy. At this time, juvenile judges were stripped of their legal authority to grant 'protection', resulting in an improvement in juvenile justice, particularly the penal aspect. The role of the law within the framework of policies relating to children was therefore decreased. However, the changes were superficial and did not represent any significant legislative reform. Therefore, when the economic crisis at the end of the 1960s began to have a significant negative impact on social policies, this trend was reversed and 'protective' judicial intervention increased. The real extent of protective judicial authority for children can therefore be directly related to the type and scope of basic social policies and services.

The ability for judges, at will, to declare a child to be in an 'irregular situation' (and therefore immediately eligible for any kind of state intervention) whether that child is a juvenile delinquent or an abused or ill-treated child, legitimises indiscriminate judicial action. This situation has arisen because practically all legislation based on the concept of the 'irregular situation' has been developed by those responsible for its application, in other words, juvenile judges. This is in direct contradiction to normal practice in jurisprudence, where a theory is developed with the involvement of all those working in a particular field - whether in terms of expertise, decision-making power or implementing capacity. In fields relating to adult rights, the equal participation of all these parties favours a plurality of viewpoints that usually ensure an effective balance in the interpretation of juridical standards. With laws based on 'irregular situations', however, the ideology of 'compassion-repression' produces disturbingly uniform viewpoints.

The persistence of the concept of 'irregular situations'

In order to understand the impact the concept of 'irregular situations' has had on attempts to implement the Convention, it is necessary to note the ways in which it has persisted. Firstly, as has already been noted, unlike other areas of law where the theory is produced by individuals outside the judicial system responsible for its application, the authors of classical texts on laws based on this are generally those people with direct institutional responsibility for its administration. Secondly, the credibility of the concept has remained intact, as criticism has focused solely on the application of laws resulting from it. There is a strong belief that 'if only' the law had been applied effectively then the concept would have proved correct. The use of euphemism in these laws (such as 'institutionalisation') also helps to explain how they have survived despite the failure of their objectives.

However, this does not explain how the concept has survived since the ratification of the Convention. Legislation based on 'irregular situations' involves the exclusion of certain categories of children from basic rights, which is incompatible with a key principle of the Convention - that of 'full protection' where the rights of all children must be guaranteed. The current situation, where some countries have incorporated the Convention into national law but have done nothing to reform specific laws, results in two conflicting sets of child legislation existing simultaneously. In addition, there is now a growing

Summary of the characteristics of legislation based on the concept of 'irregular situations'

- Child legislation in Latin America assumes that there is a radical division between two categories: 'children or adolescents' and 'minors'. The legislation, which is exclusively about and for 'minors', in fact reinforces this gap.
- Decision-making power is centralised in the juvenile judge, giving him multifaceted and discretionary authority.
- Problems relating to young people at risk are submitted to legislative processing, thus causing situations which result from the way in which society is structured to be viewed as problems of the individual.
- Punishable offences are resolved on an arbitrary basis, resulting in some cases receiving total impunity as shown in the juridical ruling to ignore serious crimes committed by young people who are middle or upper class.
- Poverty is criminalized by inflicting internment (i.e. deprivation of liberty) on the grounds of the absence or scarcity of material resources.
- The child is considered, at best, as someone to be protected.
- The basic principles of the law, including those sanctioned by the national Constitution, are explicitly and systematically denied.
- A euphemistic terminology is developed which does not allow the system to verify empirically the real consequences of its actions.

consensus that legislation based on 'irregular situations' is obsolete, retrogressive, anti-judicial and unconstitutional in nature.

In order to understand the continuing presence of this concept, it is necessary to examine the views and actions of three key groups who have contributed to its preservation:

- the legal community

Legal experts justify their standpoint by the 'good intentions' behind this legislation, stating that the laws themselves are excellent, but have not been implemented effectively. Under this premise, the action of a good judge compensates for all the shortcomings in the legislation, and any modification (e.g. the separation of punitive and protective authority) would be superfluous or might result in a dangerous reduction of the judge's powers. However, the large number of children and adolescents deprived of their liberty when they have not committed a criminal offence, or whose trials have been conducted without the necessary minimum guarantees, demonstrates clearly that the legislation itself is imperfect. In Chile, for example, according to the National Guard, almost 20% of the juveniles in adult detention centres were interned for reasons of protection, rather than having been convicted of a criminal offence (Brunol, 1993).

- Government agencies

Many government agencies responsible for implementing special protection programmes and policies share a view that only *appears* to contradict that of the legal community. It is based on the hypothesis that the bureaucratic formalities typical of the judicial sector reduce administrative efficiency. New legislation relating to children is also viewed as superfluous from this perspective. It is also easier for these agencies to work within a legislative framework that has been ignored, has lost its prestige, and which accommodates discretionary action.

- service delivery organizations

Non-governmental organizations are a recent phenomenon in child policies. Whilst they are heterogeneous, it is possible to group them into two broad categories: those closely related to the State, which offer services as an alternative to the government sector; and those characterized by a higher level of political and technical autonomy. The development and goals of agencies in the first group depend upon the will of the government. The functions of organizations of the second type range from service delivery to the formulation of complex strategies aimed at influencing the juridical and institutional structure of child policies.

In particular, the first group, which works directly with children, totally ignores the relationship between a child's legal and material conditions, and also fails to see that legislation may be a vital way of reproducing and co-ordinating successful programmes on a larger scale. These groups operate under the misconception that legislation concerning children is a matter for the government and the judges, whereas the children themselves are their responsibility. In their eyes, the struggle for legislative reform diverts precious efforts from day-to-day activity, they find it more comfortable to work separately from, or in opposition to, the government and its legislation, than to begin a difficult and uncertain process of engaging in a critical dialogue with the legal community and government.

The State's lack of interest has often justified the marginal position of these organizations, which for a long time have remained at a distance from the structures responsible for real decision-making. As their objectives focused on overcoming immediate difficulties, they were unable to perceive that the judicial context determined the quality and quantity of many of the problems they dealt with daily.

The need for new legislation

It is clear therefore that legislation based on 'irregular situations' separates children into two categories. For 'children and adolescents' these laws have little relevance, except in exceptional circumstances. When they come into conflict with the law (civil or criminal) they are dealt with through other judicial mechanisms, or, in the event of any actual violation of the law the judge's power allows them to avoid the normal legal circuits. For these 'children and adolescents', impunity is the flip-side to the arbitrary treatment of 'minors'.

For 'minors', any law rooted in the theory of 'irregular situations' has the potential (and real) capacity to determine everything in their daily lives, from compulsory inclusion in the social welfare structure to being declared legally in a state of abandonment, which may lead to a decisive and irretrievable loss of identity.

The ratification of the Convention on the Rights of the Child now makes it imperative to find new

strategies of inclusion rather than exclusion. The Convention has led all those involved in child issues to recognise that a large part of the legislative attempts to criminalize poverty are, in fact, illegal. It is a landmark in the history of child legislation in Latin America, being the first legal instrument with effective guarantees. Moreover, it has pushed the need for inclusion to the top of the agenda for those working with children. This new conceptualisation of children's rights must now be turned into concrete legislation.

This requires a number of radical changes. Firstly, the legal community is explicitly required to respect all basic legal principles - a tenet missing from all Latin American child legislation based on the theory of 'irregular situations' - and to remove the discrimination between the two categories of children. Secondly, government policies need to be based on the principle of children as people with rights, including the right to express their views freely (Articles 12 and 13). This calls for a new, wider view of government policies, which sees them as a true merger of the efforts of both state and civil society to take the best interest of the child into account (Article 3). For this to occur, community participation has to become institutionalised in the process of policy-making.

Non-governmental organizations also have to change. The Convention clearly demonstrates both that children's material conditions depend directly on their legal status, and that legislation must be seen to concern each and everyone. The time is long gone when those working directly with children were proud of not being invited to participate in the legal reform processes and projects.

The theory of full protection

The embodiment of the theory of 'full protection' can be found in a set of international legal instruments that represent a great qualitative advance in the social consideration of the child. The theory, directly derived from the 1959 Declaration of the Rights of the Child REF, is contained in four fundamental texts:

- the United Nations Convention on the Rights of the Child;
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules);
- the United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990;
- the United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines).

Although the Convention is not the first chronologically, there is no doubt that it is the most important of the four, as it provides the general framework for interpreting the other rules. The Convention has far reaching consequences: in addition to its judicial importance, it has also brought to the attention of social movements and policy-makers in advanced governments the importance of the legal aspect of the struggle to improve children's living conditions. The Convention represents a fundamental change because of its totally new perception of the condition of the child, and the theory of 'full protection' demands a re-assessment of the purpose of child legislation. Laws must now become effective instruments for the defence and promotion of human rights for all children and adolescents.

Essential features

The first difference from the theory of 'irregular situations' is that whilst 'full protection' does not ignore the existence of fundamental social differences, it calls for laws which cover all children, not only those in difficult circumstances. The child is considered to be a person with full rights, and he or she may not be detained unless it can be proved that an offence has been committed. Thus the basic principle of equality before the law is legally guaranteed, and constitutional principles relating to the safety of individuals are duly respected, as are the basic principles of the law contained in the Convention. In the hearing of penal cases, justice and appropriate punishment replace impunity and arbitrary action.

Secondly, the role of the judge is emphasized, and the specific task of resolving legal conflicts is returned to him or her. In more advanced legislation based on this theory, not only is the presence of a lawyer considered necessary for the defence, but the important functions of control and rebuttal of evidence are also given to the public prosecutor.

High risk situations are separated from an individual's personal problems, so that the most critical shortcomings are perceived as omissions in basic social policies. It is no longer the children or the adolescents who find themselves in an 'irregular situation' but also the people or the institutions responsible for action or for the lack of it.

Euphemisms are increasingly eliminated from the law, fully recognizing that detention or institutional placement constitutes a true and formal deprivation of liberty, according to the definition given in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (chapter II, item 11, paragraph b): "The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority".

Clearly the application of these principles in Latin America requires significant change in the three sectors already identified as critical in dealing with issues relating to children and adolescents:

- **the legal community**

The new child legislation is a complex instrument requiring full knowledge of the law. A judge's action should be measured against the accurate interpretation and the strict implementation of the law. The division of capacities and responsibilities with the public prosecutor and the compulsory presence of the defence, set the stage for replacing arbitrary action with justice (e.g. in the new Brazilian Act, article 207, and in the Juveniles Act of Ecuador, article 170).

- **government agencies**

The new judicial context poses extraordinary challenges to the old welfare agencies. The enactment of the Convention imposes the moral and juridical responsibility of working in conjunction with social movements and the legal community towards legislative reform.

Once a child's basic constitutional rights have been acknowledged, it is clear that special protection policies can no longer be implemented coercively. The child at risk, a product of various situations of abandonment, begins to be perceived as the direct result of the omission or absence of basic social policies. The street child, for example, is above all a school-less child. For adolescents in conflict with the law, assistance must become a strict policy of guarantees. Adolescents who have committed an offence must be identified as a specific judicial category and no longer as a vague sociological phenomenon.

- **non-governmental organizations**

The social mobilisation sparked by the Convention resulted in the development of a new relationship between non-governmental organizations and the judiciary. A concrete manifestation of this trend is the creation in Brazil of a new type of non-governmental organization, the 'Centres for the Defence of Child Rights'. The adoption of the Convention, which was effected with the active participation of non-governmental organizations, also demonstrated the importance of going far beyond mere assistance. To replicate best practice on a broad scale is only possible in this context. In addition, there is a new challenge for social movements: the sometimes difficult process of working alongside government to design and monitor a new type of public policy. In Brazil, for example, the 'Councils on the Child and the Adolescent' provide political support and judicial legitimacy for the development of such a project.

In order to demonstrate the advantages, the table below[2] sets out the guiding principles of the Convention alongside one of the other instruments of 'full protection', the Beijing Rules. The 1990 Brazilian Act is included for the purpose of comparison, to illustrate how the theory functions within a national framework.

Post-Convention child legislation in Latin America

The enactment of the Convention has had a great impact on legislation in Latin America, giving rise to a 'second generation legislation', based upon the theory of 'full protection'. But the post-Convention legislative reform movement has had heterogeneous and often contradictory results, for the Convention represents a challenge not only in terms of the contents of the law but also in the way it is developed.

Juvenile legislation in Latin America has traditionally been the result of the work of small com-

[2] This is based on the work of Rita Maxera, 1991

Guiding principles of the 'full protection' theory			
Basic Judicial Principle Governing Proceedings	UN Convention on the Rights of the Child	Beijing Rules	Brazilian Children's and Adolescents' Act (Law 8069 of 1990)
Principle of humanity: Based on the principle that the State has a social responsibility and a duty to facilitate the process of re-integration into society. It prohibits cruel and degrading punishments.	Art. 37, a-c.	Art. 1, 1.4.	Arts. 15-16-17-1.
Principle of legality: A crime, and subsequent punishment for that crime, cannot exist where there is no previous law defining it (*nullum crimen, nulla poena sine lege*).	Art. 37, b. Art. 40, 2.a.	Arts. 2, 2.2.b. Art. 17, 17.1.b.	Arts. 110-106-1.
Principle of jurisdiction: The essential requirements for jurisdiction must be in place: a judge, an independent and impartial body.	Art. 37, d. Art. 40, 2.III-2-3 b.	Art. 14, 14.1.	111.
Principle of cross-examination: The roles of judge, defence and public prosecutor must be defined.	Art. 40, 2.b II-III-IV-VI.	Art. 7, 7.1.	110-111.
Principle of inviolability of the defence: A technical defence must be present throughout the proceedings.	Art. 37, d. Art. 40, 3.	Art. 7, 7.1. Art. 15, 15.1.	111 III-124 III-206.
Principle of appeal: There must be the option of appeal to a higher body.	Art. 37, d. Art. 40, 2.b.V.	Art. 7, 7.1.	198-137.
Principle of legality of the proceedings: The nature of proceedings must be set by law and cannot be left to the discretion of the judge.	Art. 40, 2.b.III.	Art. 17, 17.4.	110.
Principle of publicity of the proceedings: This refers to both the defendant having the option of access to a record of the proceedings, and to the desirability of protecting the identity of children and adolescents to ensure that their reputations are not damaged.	Art. 40, 2.b.VII.	Art. 8, 8.1-8.2.	143.

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mittees of experts, without any discussion or real interaction with governmental or non-governmental sectors involved in practical assistance to children. Now, the production of new legislation calls for precisely this kind of co-operation.

Five different situations have arisen in Latin America following the enactment of the Convention[1]: firstly, countries where the Convention has had no effect whatsoever, either on the executive and judicial powers or on the civil society; secondly, where the Convention has stimulated both governmental and non-governmental initiatives towards legislative reform, which are currently under way; thirdly, where the Convention has been enacted whilst previous legislation based on the theory of 'irregular situations' has been maintained (eg Argentina); fourthly, countries that have made formal, euphemistic amendments to their laws according to the Convention, leaving the spirit of the 'irregular situation' theory unaltered (e.g. Colombia); and finally, countries that have undertaken the process of substantially modifying the letter and spirit of their legislation according to the Convention (e.g. Brazil and Ecuador).

It is useful to examine these scenarios in order to understand how they have arisen. Firstly, Argentina, where existing legislation has remained despite the enactment of the Convention. Social policies for children have undergone significant changes over the last seventy years, but the situation is quite different in the field of legal policies. Law 10903 of 1919 (the 'Agote Act') is the most important law. Articles 14 to 21, dealing with abandoned children and juvenile offenders, contain the main provisions, whereas Article 19, the only one that establishes what appeals can be made against a juvenile judge's sentence, has often been regarded as one of scant interest. The concept of a child as a person with rights did not feature even remotely in the juridical culture of Law 10903 and subsequent amendments did not affect either the spirit or the letter of this legislation. Nothing, therefore, has been done to change a culture of compassion-repression which does not know how to protect the weakest sectors in society without first declaring their judicial and social incapacity, and without condemning them to stigmatization and segregation.

Until the late 1980s, this law was preserved against a background of total indifference, both from the legal community and in public opinion. In sporadic outbursts of criticism, representatives of the legal community, non-governmental organizations, and those responsible for government policies, have recently highlighted the unconstitutional nature of this law. Each of these three sectors has begun to recognise its ineffectiveness and/or illegality. It is now impossible to ignore the widespread demand for new legislation, meaning a radical reformulation of children's rights according to the Convention.

The incorporation of the Convention into national legislation (Law 23849) has created a situation for which the best definition is 'legal schizophrenia', i.e. a co-existence of two conflicting laws. The current situation in Argentina cannot last forever. The nature of the new legislation depends on the effective combination of the desire for change, and the bargaining ability of those responsible for innovations. The risk of ending up with new legislation that is only a formal modification of existing laws according to the Convention is great but avoidable. This is a call not for full consensus but for the creation of a common space for discussion.

Colombia, on the other hand has made some attempts to modify existing legislation - but at a formal euphemistic level. A few days after the ratification of the Convention, Colombia passed a new Juveniles Act by decree 2737 of 27 November 1989. Although it acknowledged the Convention as its source of inspiration, this Act reformulated in its content and form all the defects of the old legislation governing 'minors'. With its modernizing euphemisms, this Act represents a superficial adjustment to the principles of the Convention. In fact, it constitutes a more refined version of the obsolete theory of children in 'irregular situations'.

A few months later, the Brazilian National Congress approved the Children's and Adolescents' Act (Federal Law 8069 of 13 July 1990). This Act represents, both in form and content, a true break from previous tradition, combined with a rigorous application of the new theory. It is an enormously positive step in the struggle for children's rights in this region. For the first time in history, legal practitioners have played a subordinate role: they have formulated a law in which the best governmental and non-governmental experiences of the preceding period were transformed into standards.

[1] Since this essay was written new laws have subsequently appeared which are in line with the spirit and the letter of the Convention.

The Brazilian Act has had an influence on other Latin American countries that has not been adequately analyzed so far. Ecuador passed a new Juveniles Act in which civil society participated to a great extent, although the term 'minor' continued to be used. By the end of 1992, two other countries passed new Acts for children. On 18 December 1992, the Bolivian legislature approved Law 1403, which provides for the creation of a new Juveniles Act. This Law represents a significant advance, considering that Bolivia was, from a legal viewpoint, the most backward country in the region, lacking even juvenile judges. However, it has critical imperfections in terms of legal technique, that could prevent its very application if they are not quickly resolved. Similarly, but with the unfortunate drawback of being approved by an **executive** decree, a new Children's and Adolescents' Act was passed in Peru at the end of 1992. This Act, despite its intrinsically positive nature, also presents serious technical and juridical pitfalls. The cases of Bolivia and Peru confirm the need for careful preparation, taking into account the views of all those who, in the government or the society, have direct or indirect responsibility for the application of the law.

The laws mentioned above are aimed at creating all-embracing instruments to deal with problems affecting children. This means co-ordinating policies and services without being restricted to any particular aspect. Nevertheless, a new, more specific type of law begins to emerge, as in the case of the Bill of El Salvador, that regulates the processing of criminal offenders. Although it is regrettable that this Bill continues to use the term 'minor', it is a carefully prepared legal text that fully responds to the requirements, in terms of form and content, of the 'full protection' theory - effectively protecting individual liberty and meeting the most demanding criteria in terms of safeguarding all guarantees.

The legislative reform process driven by the Convention is, and should remain, an extremely dynamic process. There are no rigid models, and nor should there be. Theories should be interpreted within the national context, and, more importantly with the vision that all Latin American children should be equally respected and protected. Any variation is welcome, provided that there is rigorous respect for human, and particularly for children's, rights.

2. REFORMS OF CHILD POLICIES IN LATIN AMERICA: THE STATE, NON-GOVERNMENTAL ORGANIZATIONS AND THE JUDICIARY

The social reformers' movement

Any critical reconstruction of the three principal agents involved in policy-making - the State, non-governmental organizations and the judiciary - needs to begin from the point at which children and adolescents were considered as a separate legal category. This essay examines the history of this relationship from the point at which children were treated as a separate legal category (marked by the establishment of the first juvenile court in 1899 in Illinois, USA) to the adoption of the UN Convention on the Rights of the Child by the UN General Assembly in 1989, which resulted in significant changes in policies for children and adolescents. The period between 1899 and 1989 is defined by the evolution of the consideration of the 'minor' as an object of compassion and repression to a view of children and adolescents as legal subjects entitled to their full rights.

The first serious endeavour to change child policies was the so-called 'social reformers' movement' at the beginning of the 20th century. This movement fought against the appalling living conditions of children detained in adult prisons, and fulfilled its aims in a relatively short period of time: between 1900 and 1925 it resulted in the drafting and enactment of special legislation for children.

This reform movement is often presented as radical and aggressive, particularly in Latin America, but the reformers themselves did not view their demands as moderate. This was due to the fact that these demands were able to be dealt with at the administrative rather than judicial level, which avoided conflict with those seeking to defend the status quo.

In the political and cultural environment in the United States at the turn of the century, there were no great academics specialising in criminal law. There was, however, a significant group of administrators who had excellent knowledge and experience of prison administration, which made it easier for the State and the legal profession to work together. Moreover, it was made clear that the changes to the role of judges and tribunals applied exclusively to children and did not extend in any way to adult penal control, guaranteeing a harmonious relationship between the reform movement, the State and the legal profession. The peaceful manner in which changes were obtained was also due to society's recognition that the new legislation would result in benefits in terms of social control. In essence, the 'revolutionary' demands of the movement involved just two issues: special prisons for children and the establishment of juvenile courts.

Social reformers and reforms in Latin America

The social reformers' movement arrived in Latin America at a time when critical social conflicts had brought about a decline in the region's participation in the international market and the cultural environment was dominated by anthropological positivism. Significant peculiarities in the social structure in Latin America and certain aspects of the prevailing legal culture meant that important differences arose between the Latin American Movement and its counterpart in the United States.

Welfare activities in Latin America had to be balanced with the demands for social control, and by the power of the medical profession. Retributive criminal laws (usually of French and Spanish origin) used the age of discretion as the criterion for determining criminal responsibility. They also stipulated that, in the case of juveniles, a lesser punishment should be inflicted. This was normally a reduction of the punishment (normally by a third in the case of imprisonment). The place where the sentence was to be served, however, was not specified and consequently, penal institutions designated for adults were used.

Whilst the ideas of the reform movement were widely disseminated in Latin America, and theoretically, were widely introduced, the process of concrete change was extremely slow.

There were two main differences between the Latin American version and the original model of the reformers. Although special legislation for

juveniles was introduced (between 1919 and 1939), the juvenile courts recommended in these laws were not set up in any systematic way (in Argentina, for example, this only happened 70 years after the legislation). Secondly, the practice of detaining children in adult prisons continued.

Positivism or, at least, its more extreme anthropological forms, underwent a serious crisis in the 1920s and 1930s. Subsequently, during the 1940s and early 1950s, self-sufficiency within the legal profession further weakened the reformers' model. Throughout this period, the worldwide movement also underwent other significant changes. In addition, 1950s saw the implementation of distributive policies in Latin America which had a strong impact on social policy. The State undertook responsibility for social welfare activities which had formerly been administered by the Church. A number of successful efforts were made in this field, and some attempt was made to facilitate a certain degree of self-management in social issues.

As a result of these changes, some of the reformers' ideas and practices acquired a new form. The movement of Latin American reformers reduced its scope and operational capacity considerably, focusing social welfare activities on very specific areas (e.g. blind or otherwise disabled children). Moreover, the application by the State of extensive (but exclusively vertical) social policies, helps to explain the absence of non-governmental organizations, whether opposed to or in agreement with these policies. These changes, however, had little or no impact on the legal profession or the legislation.

From reform to social movement

Distributive policies faced a crisis in the 1960s, when the State's fiscal difficulties weakened public policy. Social services deteriorated enormously, being reduced in many instances to the superficial and symbolic. The first non-governmental organization, in the modern sense of the word, came into being against this background, and brought with it political and ideological views that were different to the model of the first reformers.

Although the legal profession had initially been nothing more than an observer of this process, the State nevertheless granted it an enormous amount of power. The lack of resources for children and adolescents (caused less by the crisis than by a radical change in priorities in allocating funds) resulted in social policies that had no concrete impact, whilst the problems children faced became criminalized. This situation may be defined as the 'legalization of children's policies'.

The dictatorships of the 1970s, which characterized most of the continent, fully endorsed and consolidated this process, and the contraction in public social expenditure intensified even more in the 1980s. It is in this context that the phenomenon of the street child first appears.

During the 1980s a new type of non-governmental organization was born, committed to the cause of children and adolescents, and challenging public policies. These groups created a culture that was to continue long after the demise of the dictators, as they gradually improved their organization, expertise and technical knowledge. In addition, they began to work together and were able to exert influence both at regional and international level. Because of the seriousness of the crisis and after the experience of authoritarian governments, these organizations moved away from the State, and lost interest in attempting to influence public policy. As they also identified the judiciary with the State, they also separated themselves from the legal profession.

As a result of this, the legal profession refused to be influenced by the non-governmental organizations. It is important to note that this was the case regardless of how progressive the legal profession was, since a refusal to view needs as rights is common in the culture of compassion-repression which tends to be presented in forms which appear progressive. Legal experts rejected all proposed changes, or simply produced new legislation that at best was a re-working of the old models with some semblance of modernization. Because non-governmental organizations were isolated, the problems were presented in a fragmented way, which in turn could only achieve a fragmented response.

The current relationship between the State, non-governmental organization movements and the legal profession continues to rest on this unstable basis.

How can new legislation be produced?

The main goal of all the efforts made in this field is to ensure a general improvement in the living condi-

tions of children and adolescents (particularly those in the more vulnerable groups of society). This objective requires a reordering of the current fragmented perspective of the problems. As a result of the UN Convention on the Rights of the Child, this initiative has already begun, and needs to be further developed by non-governmental organizations.

The Convention's main merits are twofold: firstly, its contents offer enormous possibilities for legislative change, secondly, it has an extremely important role to play in influencing both public opinion and non-governmental organizations, which are now becoming increasingly aware of the need for changes at the legal and institutional levels.

Different legislation can only be achieved by radically changing the way in which legislation is produced. Extensive debate is required which involves the entire legal profession (not only experts in child rights); all those involved in government policies (including the three political and administrative levels in the country - State, province and municipality); and all members of civil society concerned with child issues. In particular, efforts should be made to comply with Articles 12 and 13 of the Convention by encouraging the direct participation of children and adolescents. The school can and must become the engine for this change.

Any State intending to consolidate or develop its democratic system must give priority to investing in their public policies, and targeting the weaker and more vulnerable sectors. This is an investment (not an expenditure), and should be seen providing material support for its citizens.

The legal community needs to adopt a two-pronged approach in order to end its isolation. Firstly, it has to avoid abstract concepts and examine the real consequences of the application of legal provisions. It must also be remembered that euphemisms have allowed a perpetuation of the purely apparent distinctions denied by the practice (e.g. between penalties and safety measures or between the situation of abandoned children and criminal offences). Secondly, the judicial power should be restructured according to the technical and material resources at its disposal. Top of the agenda should be extensive legislative reform in order to separate the provision of assistance (which should be the objective of social policies developed by the State and non-governmental organizations), from that of dealing with offences against the law.

Those responsible for security (i.e. the police) should also participate actively in the process of debate. In Latin America there is an increasing awareness that, within the context of the theory of children in 'irregular situations', the security forces were given the task of 'clearing up' the 'problems' resulting from a lack of specific social policies.

In addition, as new legislation for children is also a political endeavour, all political parties with parliamentary representatives should be involved in the process.

Every effort should be made to create a structure of horizontal participation, based on absolute respect for the autonomy of each governmental and non-governmental agency wishing to participate. The main responsibility of non-governmental organizations is to reverse the fragmentation of the problem by reformulating their objectives and priorities and radically revising their own culture. The Convention offers the necessary elements for these agencies to have a fruitful relationship with the legal profession, without the slightest fear of losing their identity. The full incorporation of the legal and institutional dimension is essential for long-term strategies. Successful experiences in this area (such as the Brazilian Children's and Adolescents' Act of 1990) show that if the legal community remains isolated or opposed to change, the movement simply creates its own body of jurists. The time is therefore ripe for action by non-governmental organizations.

Twenty guidelines for legislative reform

The basis for discussing reform should not be the text of an existing law, because experience has shown that, in such cases, discussion becomes reduced to technicalities which overshadow the scope and meaning of the whole reform. Instead, I would like to suggest twenty political and judicial guidelines which can be used to establish the basic principles in promoting legislative reform:

1. The basic reference point should be the UN Convention on the Rights of the Child, together with the other instruments that set out the principles of 'full protection':

1.1. the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);

1.2. the United Nations Rules for the Protection of Juveniles Deprived of their Liberty;

1.3. the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).

2. The contents of the new legislation should reflect the Convention.

3. The distinctions made by evolutive psychology should be considered judicially relevant. This means that all human beings under 11 years of age should be regarded as children, and those between 12 and 18 years of age as adolescents.

4. The new legislation should apply to all children and adolescents and not only to the more vulnerable sectors in society. The use of the term 'minor', which is charged with all kinds of stigmas, should be avoided.

5. A clear distinction should be made between social and educational measures made as direct consequence of a punishable offence (ranging from warnings to the deprivation of liberty), and protection measures, which should never involve coercion or compulsory detention.

6. The concept of material or moral risk should be eliminated as a criterion for the application of social and educational measures. The same applies to the vague and anti-judicial concept of children in 'irregular situations'.

7. The incorporation of all the constitutional guarantees provided for all citizens should be full, explicit and obligatory.

8. The general principles implied by the Convention should be explicitly incorporated:

8.1. Principle of humanity (Article 37 a and c);

8.2. Principle of legality (Article 37 b and Article 40 2 a);

8.3. Principle of jurisdiction (Article 37 d, Article 40 2 b III, Article 40 2, Article 40 3 b);

8.4. Principle of cross-examination (Article 40 2 b II-IV and VI);

8.5. Principle of inviolability of the defence (Article 37 d, art. 40 3);

8.6. Principle of appeal (Article 37 d, Article 40 2 b V);

8.7. Principle of legality of the proceedings (Article 40 2 b III);

8.8. Principle of publicity of the proceedings (Article 40 2 b VII).

9. The minimum age for criminal responsibility should be established for all purposes at 18 years.

10. Punitive and protective capacities should be separate.

11. Cases that do not involve punishable offences should not be dealt with in judicial proceedings. Direct participation of the local community in cases of conflicts of a non-criminal nature is a useful indicator for alternative measures.

12. Judicial competence should be preserved in non-criminal cases that may represent substantial or permanent modifications in children's and adolescents' legal conditions (e.g. adoption, guardianship, parental authority, change of name, etc.).

13. Strategies should be identified to formalize community participation in issues concerning protection.

14. The participation of municipalities in the implementation of protective or social and educational measures should be encouraged (except in cases of serious offence and measures involving deprivation of liberty).

15. There should be obligatory legal provisions to prevent the declaration of a state of abandonment simply because parents or guardians are lacking in material resources.

16. Efforts should be made to ensure that social policies for children are effective and are being implemented. Any overlap in policies should be avoided.

17. The priority of children's issues should be made effective by introducing specific mechanisms to guarantee that a minimum percentage of national funds is allocated for the implementation of policies provided for by the law.

18. Judicial authorities must receive support in terms of material and technical resources to ensure they are able to comply with the provisions of the law.

19. Euphemisms typical of the culture of 'compassion-repression' should be eliminated.

20. The child should become a priority issue on the agenda of Latin American integration.

3. CHILD CONTROL BY SOCIAL AND PENAL INSTITUTIONS

Overview

From a sociological perspective social control of children tends to be viewed as being achieved through both formal methods (police, judges and prisons) and informal methods (family, school and religion). This essay looks at the validity of distinguishing between the two mechanisms, focusing on the impact of formal control on children's rights. In particular, it examines the nature of formal and informal mechanisms in the context of the theory of 'irregular situations'.

The belief in the need for formal mechanisms of social control is deeply rooted in the ideology and praxis of penal Illuminism. In this ideology, legislation and the penal system are presented as protective of the citizen, and as deterrents against the arbitrary punitive power of the State (Ferrajoli, 1985). However, other more concrete historical analyses (see for example Hess, 1985; Horkheimer & Adomo, 1988) draw a different conclusion - that the State's punitive power, however formalised, is a method of limiting the freedom of civil society where it might challenge the state.

To understand why this conflict exists, it is necessary to look at the history of formal social control and the way in which it links with informal mechanisms. From a critical perspective, there are three explanations for the existence of formal mechanisms: the need to put into perspective and highlight certain social conflicts (eg sexual or domestic violence), which would otherwise be considered inevitable since they are viewed as being part of a specific culture (Pitch, 1983); the need to prevent or reduce personal vengeance (Ferrajoli, 1985); and finally, from a political perspective, the fact that if formal safeguards to liberties exist, then they will be taken seriously and will be viewed as protective of the weaker sections of society.

Determining whether a method of social control is formal or informal is not simple, as available literature on the topic attests. The argument that a control mechanism is formal when it involves institutionalisation is not always true, because in certain situations an informal mechanism may have a higher level of organization and formality than those considered to be formal (e.g. religion when compared to justice administration in some Latin American countries). Purpose has also proved to be inappropriate as a way of distinguishing between the two (e.g. Cerqueira and Neder, 1987, have argued that the real function of schools is as a social control mechanism).

It is much easier to deal with the complexity of the issue by distinguishing between active and passive social control. Passive social control involves individuals or groups conforming to rules, whilst active social control refers to the identification and achievement of objectives and standards by external individuals or organizations. However, it is clear from a historical perspective that the rationale behind the differentiation between formal and informal mechanisms of social control is ideological rather than practical. In the 1960s and 1970s, there was a commonly held belief that the flexibility of informal mechanisms represented a 'humanity' that was the opposite to penal justice and its repressive system. However, it is clear from other analyses (eg Cohen, 1985) that rather than replacing formal mechanisms, informal methods simply serve to complement them in situations where there was a failure to respect legal and constitutional rights. As democracy spread through Eastern Europe and Latin America in the 1980s, it set the stage for a critical reassessment of the fundamental principles of contemporary liberal penal rights. The reinforcement of these legal rights, including an interest in reducing the scope of penal justice in social life (respecting victims in particular, and the disadvantaged in general), resulted in a less ideological perspective of the formal mechanisms of social control. Despite this interest in re-establishing legal rights and examining the functioning of the penal system, penal legislation relating to children and adolescents remains an unexplored area.

It is therefore necessary to examine to what extent a formal social control structure, within the framework of a democratic system, provides for

limits to the negative punitive power of the State - which can, in theory at least, be activated by certain political circumstances. If formal and informal mechanisms for social control share the same negative characteristics, the already thin line between both categories becomes meaningless and only a radical reformulation of their basic premises can bring a solution to the issues relating to children's rights. Having outlined the framework of social control, it is then possible to reassess the rationale for classifying the penal control of children separately.

History of penal measures applied to children

There has been considerable historical analysis determining that the notion of childhood, as we categorise it today, did not exist until the late 17th century (see for example, Aries, 1985, Krisberg & Austin, 1978). These analyses refute the views of positivist psychology which associates the classification of children with specific characteristics of biological evolution, and see it rather as the result of a complex social structure which involves both structural conditions as well as changes in attitudes. In the process of 'discovering' childhood, shame and order became the two opposite sentiments that helped to shape the child's character. The latter was moulded by the family and subsequently - chiefly from the 18th century onwards - by the school, which gave it a definitive form through its three basic principles of constant supervision, reporting obligation, and the infliction of corporal punishment.

For the purpose of this examination of penal measures it is not possible to make a more detailed examination of the development of the concept of the child, but it is necessary to highlight it in order to understand why, until the end of the 19th century, penal measures did not discriminate between children and adults either in the legislation or in the punishment administered.

The history of formal social control of children as a specific strategy is a practical example of how a category of weak subjects could be created for whom protection was not a right but an imposition. All denials of rights and liberties to children are justified from the moral beliefs of the protagonists who make judgements about what constitutes unnatural behaviour. If the 18th century 'discovered' the school as the place for giving children discipline, the 19th century conceived and implemented the mechanisms that could retrieve and protect children who were expelled from, or had no access to, the school system.

The first examples of differentiated legal treatment for children are found in Swiss legislation dating from 1862 (which gives the age of criminal responsibility as 14), and the German criminal code of 1871. The most important document, however, is Norway's Child Welfare Act, drafted in 1892 and enacted in 1900. This Act contains almost all the elements of modern laws governing 'minors'. At the time of these Acts, all the legal reform policies focused on two issues: raising the age of criminal responsibility in order to completely remove 'minors' from the adult penal system; and applying specific sanctions in the case of 'delinquent children'.

Various policies aimed at segregating children started to be applied systematically in the 19th century. They were legitimated by the 'scientific' approach of criminological positivism. Documents of the period show that safeguarding children's integrity was secondary to protecting society from future delinquents. There was also an indiscriminate use of concepts such as delinquency, poverty and abuse. Society has only recently recognised child abuse as a serious problem and, more importantly, as a problem **of the society itself**. The first intervention of the State in the case of a girl who had been abused and ill-treated by her parents was bitterly ironical: in the USA in 1875, nine-year-old Mary Ellen was taken away from her parents by the legal authorities, but the institution that brought the case to light was the New York Society for the Protection **of Animals**.

The establishment of juvenile courts

Even though they did not exist in the 19th century (except for the sole case of a juvenile court in Illinois, USA), by 1930 juvenile courts were already a reality in many countries. Between 1905 and 1924 they were set up in England, Germany, Portugal, Hungary, France, Japan and Spain.

For the purposes of reconstructing the history of juvenile courts, the First International Congress on Juvenile Courts, held in Paris between 29 June and

1 July 1911, is particularly significant. All the information on this Congress has been drawn directly from its minutes, published in Paris in 1912 under the title *Tribunaux pour Enfants, 1er Congrès International. Travaux préparatoires. Comptes rendus analytiques et etnographiques publiés sur nom du Comité d'Organization par M. Marcel Kleine, Secrétaire Général du Congrès;* (this document will hereafter be referred to as 'Minutes').

Congress participants included the highest French authorities on the subject, and representatives of public and private institutions from almost all European countries and the United States. Three Latin American countries (Cuba, El Salvador and Uruguay) were present and, from all indications, made a significant contribution.

The aim of the Congress was to achieve consensus on the issue of separate legal treatment of children, as well as to examine how to protect society from juvenile delinquency. The issue of detaining children and adolescents for indefinite periods of time was also high on the agenda. It was an extremely influential meeting which paved the way for the unanimous approval of the establishment of juvenile courts in France a year later.

The Paris Congress was highly representative of the political and legal Zeitgeist. It was the first forum that systematically dealt with all the issues that recurred in the majority of official speeches on the 'delinquent and abandoned child'. The Congress also highlighted two important reasons for making juvenile justice reforms: the appalling conditions children suffered in adult prisons; and the formality and inflexibility of criminal law, which hindered the 'protective' (and also repressive) role of juvenile justice by insisting on procedural principles.

Although the reforms being proposed were considered revolutionary by many countries (Latin America was a good example of this), analysis shows that this was not the case. In fact, the reformers themselves denied that their demands were radical. In his opening speech to the Congress the French Parliamentarian Paul Deschanel stated: "These conferences are necessary to show that the reforms we want are not at all revolutionary and may be effected without substantially altering the existing codes, by simply adapting old laws to modern needs" (Minutes, p. 48).

The calls for the establishment of juvenile courts were justified not only as a means of protecting young people in danger, but also as a way of protecting society at large from juvenile delinquency. Deschanel declared that the courts would "become central to the fight against juvenile delinquency, helping to recover corrupt children and also safeguard children in moral danger" (Minutes, p. 49).

But it is the influence of the American delegate, C.R. Henderson which is most evident from the minutes of the Congress. Henderson represented a country that was not only a pioneer in the subject but also one where social and penal policies governing 'minors' had reached the pinnacle of administrative achievement. European jurists consistently praised American pragmatism and flexibility. If Europeans were recognised for their contribution to the development of penal theory, Americans were seen as masters in its administration. Henderson bases his statements on positivism, arguing that psychology had shown that there were radical differences between children and adults. He argued that prisons were "*bona fide* laboratories for pedagogical science" (Minutes, p. 56). Whilst in the 18th century the category of 'child' had been defined using the school as a point of reference, what was now happening was that the 'science' of psychology and penal control mechanisms were being used to define children.

In proposing reform, Henderson reminded the Congress that, "Democratic movements in this century have bridged the gap between social classes in an unprecedented manner. Many persons now understand the dangers that poor working-class families are facing. This is another reason for modifying criminal and procedural law " (Minutes, p. 57). Procedural changes were necessary to ensure total discretion, which would avoid any conflict with existing theories. If the State was to exercise the functions of protection and control, the procedures of Illuminist law had to be modified drastically. A first step towards achieving this was to stop distinguishing between delinquent, abandoned and abused children.

The reforms being proposed also sought to substantially modify the role of the judge. The Belgian delegate, A. Prins, stated that juvenile jurisdiction should be family-oriented and the judge should play the role of both father and supervisor (Minutes, p. 61). The delegates agreed that, accord-

ing to this principle, no defence should be allowed.

Almost all Congress participants concurred that sentences should be of no fixed duration. This was based on the argument that the sentence was necessary in order to protect the child, and that only an indefinite sentence would allow for permanent protection. The Belgian delegate, Baroness Carton de Wiart explained,: "A fixed term means temporary protection. An indefinite sentence provides permanent protection" (Minutes, p. 545).

By the end of the Congress, control and protection policies had taken on a new dimension, involving a whole category of individuals whose weakness or incapacity needed to be sanctioned both judicially and culturally. Regardless of the functions given to private institutions, the State maintained responsibility for the organization of social and penal assistance, with no pressure to ensure safety or rights. Protection, which meant different forms of segregation, would be given only within the framework of a pathological classification of children. The child was considered, at best, an object of compassion and never a person entitled to rights.

Social and penal control of children in Latin America

This reform movement in Europe and the United States could not go unnoticed in Latin America. The establishment of juvenile courts seemed to be the most adequate response to the background of intense social conflicts resulting from Latin America's subordinate position within the international market in the early 20th century. Juvenile courts were set up contemporaneously with, and sometimes even before, European countries; between 1919 and 1928 they were created in Argentina, Brazil, Mexico and Chile.

Although the establishment of juvenile courts was called for in new legislation for children, it did not automatically occur. In Argentina, for example (the first country to introduce legislation on 'minors') the first court was set up 19 years after the legislation, and then it was exclusively for the province of Buenos Aires.

Juvenile judges were charged with trying to understand the children's psyche. Every judge was expected to be calm and loving: a judge and a father. Without prejudicial formalities. Without public responsibility. Without prosecution or defence. Except for special cases, a prosecutor was not admitted because trying to prove the defendant's guilt was seen to be clouding the picture. The defence, in its attempt to soften the guilt, was also seen as potentially leading defendants to believe that the crimes of which they were accused were pardonable acts, which they could repeat at will without risk of punishment. As to the delicate choice between a fixed or indefinite sentence, preference was unanimously given to the latter.

Latin American plans and activities in this field, however, were not a mere reflection of what was happening in industrialised countries. By the mid 1930s a new trend had spread over the continent, with Argentina at its epicentre. A psychological and pedagogical approach developed within the confines of criminal anthropology, throwing doubt upon punitive mechanisms. Between 1884 and 1937 four projects for the organization of children's institutions were taken to the Argentine Parliament. The differences between the legal and the medical-psychological approach to criminality gradually became evident. The medical-psychological community lobbied for raising the age of criminal responsibility in criminal law and demanded that children accused of an anti-social act should be taken to an 'Institute for the Observation and Classification of Children' for a thorough medical and psychological examination, after which they should be sent to the most appropriate centre for medical and educational assistance. This approach implicitly rejected the notion that the causes of children's acts were as a result of social conflict in Latin American societies, and paradoxically, if it had been successful would have resulted in the abolition of juvenile courts.

Blind confidence in the scientific nature of medicine, biology and, above all, criminal psychology, effectively eliminated the principle of legality. The concept of 'delinquents' (especially if they were children) covered not only those who were convicted of an offence, but the entire category of weak individuals whom these scientific instruments detected as being potential delinquents. A good example of this trend is the Biological Laboratory for Children founded in Rio de Janeiro in 1936, which was modelled on the Pedagogical Medical Centre for Observation in Rome created in 1934. The Director of this Institute stated that, "These biological research centres for children and young

persons should be endowed with all the necessary resources, both material and human, so as to facilitate knowledge of the life of delinquent or abandoned minors prior to their involvement in crime." (Ribeiro, 1938, 226)

The obsession with classifying and studying the development of delinquent and abandoned children, however, never ended in general quantitative evaluations. Given the vagueness of scientific standards and definitions, the only available data was that of a small abnormal and segregated world. The characteristics of 'delinquent and abandoned children' were inferred from those of the children interned in institutions.

These psychological and anthropological ideas underlying the legislation governing 'minors' were progressively accepted in the 1940s and 1950s. There was no radical change, however, in the basic features of the previous policy. Indefinite sentences, the lack of distinction between offenders and abandoned children, the constant struggle to raise or lower the age of criminal responsibility and, above all, protection through segregation, continued to be central tenets of official theory and practice.

Only the new sociological trends in the United States gave a greater international thrust to theories on the 'minor'. The internationalisation of these theories, which began in the 1940s and reached its peak in the 1960s, did not mean a simple exchange of experiences. The influence of the United States was remarkable, particularly in the field of juvenile delinquency.

In Latin America, however, the practice of classification, segregation and denial of rights for children continued in much the same way as it had done for the disabled, ethnic minorities and immigrants. Imprecise reasons for segregation were given - emotional imbalances, personality clashes and divorced parents for example. Protective measures aimed at re-education became euphemisms which legalized new forms of segregation and exclusion. Until now, there have been no significant modifications in this area, despite developments in industrialized countries where the respect for child rights and negative experiences with coercive 'benefits' have resulted in important changes.

The actual informality of formal social and penal control mechanisms governing children and adolescents must be highlighted in order to create a new social policy based on respect for human rights. A cultural shift is vital in order to demonstrate the absurdity of attempting to protect the weakest sectors of society by declaring their incapacity and condemning them to isolation.

Children and adolescents deprived of their liberty

If deprivation of liberty is a euphemism in terms of adults (because social reintegration cannot be obtained by means that constitute its most absolute negation), the situation becomes extreme in the case of children and adolescents.

When the democratic revolution at the beginning of modern history first established that there should be specific time periods for the deprivation of liberty, not everyone benefited from this change. Those who were not involved in the productive process risked finding themselves excluded from the advantages of democracy. Although children and adolescents actually do participate in the productive process, however marginally and surreptitiously, they are absent from official labour reports. This does not mean that children are not subjected to deprivation of liberty, but rather that this practice is legitimized in a totally different manner. The euphemisms used to justify deprivation of liberty without trials, without guarantees and without a specific duration, are in this case 're-education' and 'safety measures'.

In Latin America, excesses in the practices related to deprivation of liberty (such as the detention of young people in adult institutions) are in keeping with a whole system of principles: the theory of children in 'irregular situations'. This is the framework within which the two-headed monster, 'delinquent and abandoned children', was created and the category 'minor' was established as an object of compassion and repression. Measures involving deprivation of liberty are camouflaged by euphemistic expressions such as 'institutional placement' (in the 1991 Juveniles Act of Colombia, and the Draft Bill on Custody of Minors with Irregular Conduct of El Salvador of 1992) or 'internment treatment' (in the Law Governing Treatment of Juvenile Offenders of Mexico of 1991). Whilst measures involving the deprivation of liberty should not be rejected *a priori* in cases of serious offences committed by juveniles,

euphemisms must be challenged as they allow this practice to be extended to previously unheard-of limits under the pretext of 'protection'.

The new Brazilian Children's and Adolescents' Act has brought about a radical change by establishing that coercive deprivation of liberty should only be used as a punishment for serious criminal offences that have been proven (Article 122). The Act includes the principles of institutional and professional competence, which require the institution to resemble the outside world, as far as possible. The success of efforts towards resocialisation depends on this.

We have been brought up within a culture that linked resocialisation with the deprivation of liberty. A change in culture is necessary which involves learning to accept diversity. Socially undesirable behaviour that does not constitute a criminal offence may, and often should, be the target of specific policies, but these policies must not be coercive.

Paradoxically, the aim is to find the best possible answer to a problem that has no ideal solution. An ideal institution for the deprivation of liberty does not exist, because the best society is that in which social conflicts need not be resolved through repression.

VIOLENCE AGAINST CHILDREN

The issue of violence against children tends to arouse indignation, and the desire to denounce it out of hand is understandable. However, without a detailed examination of its causes it is impossible to devise a strategy to reduce or eliminate it. If our criticism is to be effective, it must be targeted, and this can only be achieved if the quantitative and qualitative scope of the problem is first ascertained.

Facts are sometimes interpreted as 'inevitable' (a euphemism which legitimizes them), and this clearly indicates that social acceptance of some sort underlies the issue. Presenting violence as 'inherent' in the way society is structured is a subtle way of justifying it.

The concept of child violence is charged with emotive nuances that either legitimize or condemn it, in both cases hindering an understanding of the problem. Public opinion almost always considers violence to be synonymous with aggression. It is therefore important to clarify what is meant by violence.

Using the definition of John Galtung (Galtung, 1975), violence comes into play whenever the actual development of a person, both physically and spiritually, is below his or her potential development. In this situation violence is the reason for the difference between reality and possibility (for example, whenever there are means to fight a particular disease or feed a population, death by disease or starvation is a clear indicator of violence). This non-ideological definition is general enough to include most situations, and specific enough to provide a basic framework within which to operate. It also allows further specific differentiation: between direct and indirect violence, physical and mental violence, and flagrant and latent violence. Within this conceptual framework, it is possible to identify structural violence as a situation in which the differences between reality and possibility are presented as part of the social system.

Violence and the social reality

Since reality itself is a social construct, both violence and its counterpart, peace, depend directly on the consensus of society. Some forms of social interaction are considered to be violent and, among these, some belong to the category of criminal violence. The former are determined by the general mechanisms of power and socialization, whereas the latter are defined by the penal justice system. From this perspective, it is clear that violence and criminal violence are social constructs, with a greater or lesser degree of arbitrariness depending on the degree of consensus and rationality.

The different ways in which society perceives the victims of violence explain the different social reactions to it. The perception of violence is determined by its visibility, which in turn depends on who its victim is. No in-depth analysis is needed to understand the much more visible nature of personal violence, when compared to structural violence. Structural violence can be said to have its origin in personal violence, but, at the same time, an individual who inflicts personal violence is the product of socialization in a society where structural violence exists.

Children as victims of violence

An analysis of the mechanisms involved in the creation of the social category 'child' must take into consideration the institution that plays a significant role in this categorisation - the school. Given its function as means of socialization, its absence or presence is a significant divider of children. In some societies, there are exclusion mechanisms that deprive a considerable number of children of access to schooling or, without excluding them, do not provide the necessary resources for them to remain in education. The difference between children with schooling, and children without schooling, is so great that one single category cannot cover both groups: in Latin America, those exclud-

ed by the system become 'minors', while only those accepted by it are treated as 'children' or 'adolescents'. For children with schooling, who are usually children with a family, school and family perform the necessary roles of control and socialization. For 'minors', a different form of social control is required - the juvenile court.

Beyond the obvious functions of juvenile courts, it is easy to see significant differences in their actual operation, according to how deep-rooted and far-reaching the exclusion mechanisms are in each particular society. In other words, they depend on the level of structural violence in the society. The degree to which children are protected by basic social policies determines to a large extent the scope and quality of this control mechanism.

Even without detailed statistical information, it is apparent that in industrialized countries control mechanisms specifically for children focus solely on tackling problems inherent to the individual child. In Latin America, however, there has been an attempt to tackle structural problems by transforming them into judicial issues.

Nevertheless, we cannot say that violence against children and adolescents is limited to less developed societies. What we can say is that there is a direct relationship between the way a society is structured and the visibility and nature of violence in that society.

History shows that society's perception of children is based on the assumption that there is a high degree of latent violence that can easily manifest itself, with varying degrees of brutality. For centuries, it has been more or less legal, and socially acceptable, to inflict violence on children, particularly within the family unit. It was only ten years ago that a modification was made to the Spanish criminal code which had allowed even serious injuries inflicted on children by their parents, considering it to be 'excessive but legitimate corrective measures'. Sadly enough, significant changes in social reaction to violence against children are closely related to, and modelled on, the protection of animals.

A critical analysis of violence in society helps to explain the specific nature of the most brutal form of violence today: the systematic extermination of children and adolescents by organized groups. This practice has reached alarming proportions in Brazil in recent years. There have been several initiatives to obtain a detailed picture of the true scale of this phenomenon, but so far the results have not been brought together to allow a full analysis of the problem. The figures coming out of the most extensive research, put the number of children and adolescents killed each year at about 1,000. If everyday violence against children (ill-treatment, abuse, etc.) is a common trait of a society that puts this particular category of people as inferior on the social scale, then elimination is a brutal version of that same culture. This violence is not meted out to children in general, but only against those children categorised as 'minors'. An analysis of the victims of elimination confirms that, when there is structural violence, the targets of the most severe forms of violence are those who cannot find their place either in the educational system or the labour force.

Systematic violence against a certain category of children is not a new phenomenon. What is new is that the Children's and Adolescent's Act highlights it and provides a legal framework to tackle the problem. The Act seeks to change the culture of inferiority and subordination where violence is continually increasing, and is even legitimized. It requires a change in policy which will transform the needs of 'minors' into the rights of 'children and adolescents'. In order to break the cycle of judicial impunity we need to break the cycle of social and cultural impunity, which is far more subtle. The passing of the new Brazilian Act means that the practice of exclusion is no longer legitimate, at least from a judicial viewpoint.

What can be done?

Recently, the joint efforts by those parts of the government and civil society which are most sensitive to the issue, have succeeded in shifting the topic of violence against children and adolescents from the alarmist police reports of the sensationalist press to a prominent place in the political pages of the national press.

The National Commission on Violence against Children and Adolescents, comprising members from governmental and non-governmental organizations (with the participation of UNICEF), was created in December 1990 as part of the Ministry of Justice. It has made a systematic effort to fight violence against children and adolescents, and is beginning to obtain results that can be measured by

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the increasing number of police files and legal investigations in many states of Brazil.

The 'System for Recording and Monitoring Violence' that already exists in the state of Bahía is an initiative of UNICEF, assisted by the Nucleus for Studies on Violence of the University of São Paulo (NEV), the Brazilian Centre for the Child and Adolescent (CBIA), and the Faculty of Law in Bahía. It is starting to supply information (obtained from the press and the Institute of Forensic Medicine, and including a detailed profile of the case, the victim and the perpetrator) that provides a general overview of violence, and facilitates the monitoring and reviewing of specific policies implemented in that area. This is one of the most concerted efforts made to identify the exact number of cases of violence against children and adolescents.

The CBIA, a federal organization responsible for special protection policies for children, is currently extending the System for Recording and Monitoring Violence to other states selected by the National Commission on Violence against Children and Adolescents.

Ending violence requires action day after day. A society can only rid itself of violence if the indignation at the death of any of its citizens is always the same, regardless of race, social status or religion.

SERIOUS OFFENCES COMMITED BY ADOLESCENTS IN BRASIL

The issue of juvenile offending

The number of adolescents imprisoned in Brazil for serious crimes is low, especially when compared to other categories of juveniles in at-risk situations. In most federal states the number does not exceed 100 and only in the states of Rio de Janeiro and São Paulo does it reach approximately 300 and 1250 respectively.

This analysis of serious crime committed by adolescents in Brazil will use the legal framework set up by the new Children's and Adolescents' Act. Using this framework, the term 'serious juvenile offender' is used to describe those who have been deprived of their liberty according to Article 122 of the Act. Experience has shown, however, that currently neither all the adolescents convicted of serious offences are sentenced to deprivation of liberty, nor are all those deprived of their liberty those who have been convicted of serious offences. Article 121 of the Act defines serious offence as a "severe threat or violence against a person"; however, it also states that deprivation of liberty '**may**' be applied, thus forcing the judge to consider carefully the suitability of this course of action.

There are three reasons why the issue of deprivation of liberty is so important:

- **judicial:** judges must comply with the provisions of the Act;
- **political:** if this issue were dealt with inadequately it would have a negative effect on governmental and non-governmental policies as a whole;
- **ethical:** by dealing with the problem in the correct way, the general public can be educated. This is essential as only a society that has learned to respect those worse off can learn to respect everyone.

Trends in juvenile justice

Since it was identified as a specific problem, juvenile delinquency has been a recurring issue, impacting on all child and adolescent policies in Latin America. In situations of serious crisis its existence may be taken for granted, and present-day Brazil is no exception to the rule. So far, there have been two equally erroneous approaches to dealing with the problem:

- **a repressive approach:** This comprises a lowering of the age of criminal responsibility, which has led to an increase in repression. Lowering the age of responsibility has proved useless, or has even served to aggravate the problem by increasing the number of serious offenders. In fact, in many cases of serious offences committed by adolescents (e.g. in drug-related crimes), adults have acted as instigators. So, if the age of criminal responsibility is lowered, adults simply recruit children who are under the new age limit. Furthermore, this measure should not be applicable in countries that have ratified the UN Convention on the Rights of the Child and enacted it as national legislation
- **a paternalistic approach:** Formally, this means a refusal to recognize that serious offences can be committed by adolescents, whilst assuming an automatic link between poverty and criminality.

In concrete terms, it leads to the deprivation of liberty and the suspension of rights and guarantees. It is one aspect of the theory of 'irregular situations', where the use of euphemism has resulted in thousands of young people being detained in Latin America (often in adult prisons) without officially being 'deprived of their liberty'.

The Brazilian Children's and Adolescents' Act radically changes the legal framework for discussion and sets the stage for further debate. In full accordance with the Convention, the 'juvenile offender' is no longer a vague sociological category to which imprecise measures are applied. He or she now belongs to a specific judicial category and is a person entitled to the rights established by the theory of full protection.

Facts and perception

Unlike adult criminal law, in which offences are clearly defined, punishable acts, laws governing 'minors' define offenders as a vague sociological category. Objective criteria for measuring the actual existence of juvenile delinquency are replaced by an external factor to both the juridical system and to social policy: public opinion, which sways under the pressure of social alarm. If 'public opinion' as a concept is problematical (see, for example, Habermas, 1962, who notes that what is often defined as 'public' opinion is in fact no reflection of the broad view of the public), the waves created by social alarm often bear no relation to the real scale of the facts that cause them. Thus, a small number of serious crimes committed by adolescents may lead to widespread social alarm, resulting in arbitrary, illegal and/or ineffective measures to tackle the problem.

Three sources of information can be used to measure the scale and magnitude of juvenile delinquency: official statistics, specific research, public opinion. In addition to the intrinsic difficulties posed by the first two sources, the choice of objective criteria for measurement is always problematical, even in ideal political, economic and institutional situations. A social issue can be interpreted in different ways depending on the perspective - as sickness, emotional imbalance, age-related trauma, a predisposition towards crime, etc. The deficiencies of the first two sources tend to be compensated for by the least objective and most changeable of sources, i.e. public opinion.

That is why there is an urgent need to deal with the matter of juvenile delinquency by examining the relationship between juveniles and the legal system. This involves examining both their material and legal situations, both of which are dynamic variables which are constantly changing.

From the abandoned child to the juvenile offender

The progressive deterioration of Latin American children's material conditions can be divided into three periods, all of which resulted in social alarm.

- the abandoned child of the 1960s: Facts were explained through individual psychological factors, while structural causes remained in the background. Two different solutions were usually proposed: adoption (after declaration of abandonment) or strategies for the reinforcement of family ties.
- the street child of the 1970s and 1980s: This stage can be divided into two periods: 1980-1985 and 1985-1990. In the first period a political view based on 'needs' still prevailed. Street children were seen either as the forerunner of a new era or as a clear sign of the deterioration and contradictions of a system nearing total collapse. Solutions usually ignored any legal aspect, concentrating instead on individual ethical issues. In the second period the perspective changed radically: needs became rights, and the importance of the relationship between children's legal and material conditions was enhanced. Brazil, with its Children's and Adolescents' Act, became the epicentre of this new view.
- today's juvenile offender: The issue of juvenile delinquency surfaces periodically in public opinion, more as the result of successful social alarm campaigns than of a qualitative or quantitative growth of the problem itself. Social alarm is not autonomous, but invariably depends on public order policies. In the absence of specific research, police and legal statistics are more or less the only objective data to counterbalance shifts in public opinion. There is still open conflict between a culture of protection and repression based on the theory of 'irregular situations', and a new juridical framework in which adolescents are recognized as

the subjects of rights. Previously, the police used to carry out repressive measures because basic social policies were practically non-existent. Today, following the enactment of the Brazilian Children's and Adolescents' Act, police interventions, provoked by deficiencies in social reordering are seen as illegal and/or ineffective. The acts of coercive detention of street children, given full coverage by the press and intended to shift public opinion into a feeling that 'something is being done', contribute to an increase in the official numbers of juvenile offenders, which further provokes social alarm.

Juvenile offenders and institutional competence

It is important to examine the kinds of offences committed by adolescents. Firstly, there is no doubt that some adolescents do commit serious criminal acts, although the numbers doing so are very low (the average number of murders committed by adolescents in Rio de Janeiro and São Paulo together does not reach 8 per month). Secondly, any society must protect the right to public and individual safety. Thirdly, in times of crisis and social alarm, the issues of juvenile delinquency and public security impact negatively on the debate regarding policies for children as a whole. This can currently be seen in São Paulo and, to a lesser extent, in Rio de Janeiro.

The Children's and Adolescents' Act clearly eliminates the unhelpful debate on the penal relevance of 'anti-social' behaviour ascribed to adolescents. Article 103 is unambiguous when it defines 'offence' as an action that is explicitly considered a transgression or crime by the law. According to the interpretation of Articles 101 and 105, criminal responsibility for such an act begins at the age of twelve.

The non-euphemistic use of the term 'deprivation of liberty' (Article 121) to signify detention is an extremely important clarification which has so far been lacking in Latin American child legislation. The Act has eliminated the hypocrisies of the old culture, which deprived children of their liberty without every identifying it as such. At the same time, the new legal order implies a greater severity, albeit combined with all the necessary guarantees of protection from illegal or arbitrary detention (Article 106), and for a fair trial (Articles 110-111). Once it has been legally established that the crime has actually been committed, it is up to the legal authority to apply one of the measures provided for in Article 112.

Article 121 gives a definition of 'deprivation of liberty' that is in keeping with the theory of full protection. It states that the deprivation of liberty must only be used in exceptional circumstances, must be as short as possible and must take into account the special needs of children who are in the process of physical and emotional development.

Article 122 categorically states that internment may only be applied when:

I. the offence involves serious threat or violence to a person,
II. the case involves repeated perpetration of other serious offences,
III. there has been repeated and unjustified non-compliance with previously imposed measures.

Paragraph 1 further specifies that in the case of item III the period of internment may not be longer than three months. Paragraph 2 is particularly significant: it states that internment should under no circumstances be applied if other suitable measures are available. The last provision can be said to invert the 'burden of proof', by charging the judge to show, with supporting evidence, why the application of a measure other than internment was not possible. If no other measures are possible due to institutional shortcomings then action should be taken to correct the situation, but this is in no way a justification for the deprivation of liberty.

The provisions in Articles 123 and 124 are so clearly stated that they require no further explanation, and non-compliance can only be seen as a deliberate omission on the part of the relevant authorities:

"**Art. 123.** Internment should be served at an institution reserved exclusively for adolescents, different from that used as shelter, with rigorous separation on the basis of age, physical build and the seriousness of offences.
Paragraph 1. During the period of internment, including temporary internment, pedagogical activities will be obligatory.
Art. 124. The adolescent deprived of his or her liberty has a number of rights, including the rights to:

I. to meet personally with the representative of the public prosecutor,

II. to make a direct petition to any authority,

III. to meet privately with his or her defence,

IV. to be informed of the status of his or her case, whenever he or she so requests,

V. to be treated with respect and dignity,

VI. to remain interned in the same locality, or that which is closest to the domicile of his or her parents or guardian,

VII. to receive visits at least once a week,

VIII. to correspond with family members and friends,

IX. to have access to the objects required for hygiene and personal cleanliness,

X. to live in lodgings offering adequate conditions of hygiene and health,

XI. to receive schooling and professional training,

XII. to carry out cultural, sporting and leisure activities,

XIII. to have access to the communication media,

XIV. to receive religious assistance according to his or her own belief, whenever he or she so desires,

XV. to retain possession of his or her personal objects and to have a secure place in which to store them, receiving a written acknowledgement for objects kept by the institution,

XVI. to receive all personal documents required for life in society, upon departure from the institution.

Paragraph 1. Isolation will under no circumstances be applied.

Paragraph 2. The judicial authority may temporarily suspend visits, including those of parents or guardian, if there are serious and well-founded reasons to consider such visits prejudicial to the interests of the adolescent.

By stating that pedagogical activities must continue even when an adolescent is deprived of his or her liberty, paragraph 1 of Article 123 makes the internment institution responsible for these activities.

Article 125 and paragraph 1 of Article 121 contain provisions regarding the concrete application of the sentence of deprivation of liberty. Unlike other provisions of the Act and even constitutional standards (Article 227 of the Constitution), Article 125 exclusively charges the State with the full responsibility for ensuring the physical and mental integrity of interned adolescents and for the adoption of suitable measures of confinement and safety. Given the constitutional provisions in the area of public security, the word 'State' here refers to federal units (i.e. provinces).

Internment units should implement detailed policies for social reintegration, founded on two basic principles: institutional and professional competence. The size of the units should respect adolescents as people who are going through a stage of physical and emotional development, and Article 12 states that ideal number of people per unit is 40-50. It also notes that from the point of view of social reintegration, an excessively small number of people is as negative as overpopulation.

Assisting juvenile offenders deprived of their liberty

The principle of institutional competence means that the internment institution should reflect, as far as possible, the normal activities of the outside world (education, health, recreation, etc.), in anticipation of complete social reintegration. This principle is justified both by the successful experiences elsewhere (e.g. in Italy) and by the standards set out in the theory of full protection.

The principle of professional competence refers to the need to put an end to the tradition of 'negative solidarity' that invariably characterizes detention centres. Structural changes must be introduced in order to reverse the current trend towards anti-pedagogical complicity between teachers and students. Those responsible for education should, therefore, also be working with adolescents in the outside world (with the exception of the staff responsible for management, administration and infrastructure). It is therefore advisable that the teachers do not work in the institution more than 10-15 hours per week, in order to give them time for involvement in activities in the outside world.

Safety

When dealing with the issue of safety, all preconceptions must be replaced by the higher principle of

respect for the physical and mental integrity of interned people (Article 125). The recent killing of many adolescents in Brazil under a variety of different circumstances is a result of the irresponsible destruction of detention centres and/or the absence of a suitable policy for detention and security.

In particular situations, the external security of detention centres must be guaranteed by the relevant organization (i.e. the Military Police, because in Brazil this security unit is responsible for the maintenance of public order and should not be confused with the Police Force of the Army). This body should be able to intervene inside the detention centre only at the express written request of its director, and after consultation with the judicial authority responsible for it.

A necessary Utopia

The only possible legitimacy in continuing the practice of depriving adolescents of their liberty should be that attempts are also made to reduce the negative impact it has. Whilst this measure continues to be used in exceptional circumstances, society must work together to progressively free itself of a situation where social conflicts are hidden rather than being resolved. Deprivation of liberty should always be considered in the light of the Utopian idea that the only ideal prison is one that does not exist.

THE NEW BRAZILIAN CHILDREN'S AND ADOLESCENTS' ACT

The new Children's and Adolescents' Act (federal law 8069) was approved almost unanimously in both houses of the Brazilian Parliament on 13 July 1990. The Act has 267 articles in all, including long-term and interim provisions contained in Articles 259-267. It became operative on 14 October 1990, taking the place of the Juveniles Act of 1979 (law 6697).

The success of this law, which provides for the full protection of the child and the adolescent (Article 1), lies in its innovative content. The significant differences between this Act and other Latin American legislation governing juveniles are clear. It is the first time that Latin American legislation governing children and adolescents rejects the theory of children in 'irregular situations' and replaces it with the theory of full protection.

Of the many innovations in the Act, the following are the most characteristic:

- service delivery is devolved to municipal level (Article 88 I),
- coercive confinement in cases of social distress is removed: Article 106 specifies the reasons for deprivation of liberty (flagrancy or a written and justified motivation of the competent judicial authority are indispensable,
- the equal participation of the government and civil society at the three political and administrative levels (federal, state and municipal) is guaranteed by the establishment of Councils on the Child and the Adolescent (Article 88 II),
- there is a differentiation of the roles of the judiciary, with municipal Guardianship Councils assuming responsibility for dealing with cases that do not represent punishable offences and do not involve significant changes in the legal status of children or adolescents (Articles 136-137).

This shift away from the Latin American tradition is the result of a unique relationship in Brazil in the 1980s between non-governmental organizations, government and the judiciary. Until then, the Brazilian situation was no different from the rest of Latin America. In the 1940s, the role of private organizations in social welfare had weakened and by the 1950s social welfare had become integrated into public policy. Distributive measures were effectively applied, and any shortcomings in the system were dealt with through judicial interventions. Legislation governing 'minors' gave judges far-reaching powers and non-governmental organizations did not yet exist in this field. In the 1960s, the gradual economic crisis had a significant impact on public policy, placing even greater weight on judicial solutions. This trend intensified in the 1970s under dictatorial regimes, which made partial legislative reforms that formally extended the scope of provisions for the protection of the child whilst lowering the age of criminal responsibility. Non-governmental organizations involved in child and adolescent issues had grown in bold opposition to the totalitarian practices of the State and the legal community, but had not participated in the legislative reforms.

At the beginning of the 1980s, discussion began

in Latin America on the concept of an international convention on child rights. For the first time, non-governmental organizations began to focus their attention on a legal instrument. In Brazil, this process coincided with the intensive discussion resulting from the drafting of a new Constitution. Non-governmental organizations were able to ensure that the Constitution, approved on 5 October 1988, included the basic principles of the Convention just over a year before it was approved by the United Nations General Assembly on 20 November 1989.

Article 227 of the new Constitution established absolute priority for children's issues:

> *"It is the duty of the family, the society and the State to give absolute priority to ensuring that the child and the adolescent have the right to life, health, food, education, sports, professional training, culture, dignity, respect, liberty, participation in family and community affairs, as well as to protection from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.*
>
> *I. The State shall promote comprehensive health programmes for children and adolescents, in conjunction with non-governmental agencies and in keeping with the following guidelines:*
> *I. A percentage of public funds must be used for health care programmes for mother and child.*
> *II. Specialized prevention and health care programmes for the physically or mentally handicapped must be created, as well as programmes for the social integration of the handicapped young person such as job training, community participation, facilitating access to public goods and services, removing all preconceptions and physical obstacles..."*

The next step was to turn the general principles of Article 227 of the Constitution into specific national legislation. A 'National Forum for the Defence of Children's and Adolescents' Rights' (DCA Forum) designed a national plan of action, which included a three year strategy to address changes to the law and institutions as well as improving service delivery.

The process of creating a new legal order was complex. The majority of experts in juvenile justice rejected the new rules proposed by non-governmental organizations. They accused them of attempting to overturn the 'natural' order prevailing in Latin America. Nevertheless, a group of jurists sensitive to social issues understood the need for intelligent and broad co-operation at all levels. It was necessary to use both the rich experiences of non-governmental organizations and the most advanced public policies as a basis for new legislation. The Act was the most appropriate legal instrument to reaffirm the most successful practices of the 1980s, which had been marginal or in opposition to the existing legislation.

Short-sighted social control policies were replaced by a framework which used children's material conditions as a concrete indicator of success or failure. Tolerance rather than control was the basic philosophy for ensuring social peace and the preservation of the rights of society as a whole.

Both the spirit and letter of the Act reflect the challenge posed by the repeated failures of previous policies and programmes for protection and prevention. The new law recognizes the complexity of the problem and considers deprivation of liberty as a social and educational measure which should only be used as a last resort.

The accused is entitled to individual rights (Articles 106-109) and procedural guarantees (Articles 110 and 111). Article 1 of the Act provides for the "full protection of the child and the adolescent" and Article 2 introduces definitions usually missing in Latin American legislation: "any person below 12 years of age is considered to be a child and anyone between 12 and 18 years of age an adolescent".

An act can only be considered as an offence (with subsequent punishment) if it has been committed by an adolescent. Where children have committed acts which would be considered offences by adolescents, then Article 105 states that the measures set out in article 101 must be applied:

> *"Whenever any of the cases specified in article 98 (threat to or violation of the rights set out in this law) is found to exist, the competent authority may establish, amongst others, the following measures:*

I. implication of parents or guardians by declaring their responsibility,
II. temporary guidance, support and monitoring,
III. obligatory enrolment and attendance at public elementary schools,
IV. involvement in government or community programmes for family, child and adolescent assistance,
V. demand medical, psychological or psychiatric treatment in a hospital or out-patient regime,
VI. inclusion in a government or community programme for aid, orientation and treatment of alcoholics and drug addicts,
VII. placement in a sheltering institution,
VIII. placement in foster homes.
Paragraph 1. *Shelter is a temporary and exceptional measure that can be used as a transition to placement in a foster home, without implying deprivation of liberty.*"

It is important to point out that acts committed by children are no longer the responsibility of the judiciary but of the 'Guardianship Councils'. This new institution frees judges from various tasks related to social policy, and allows them to concentrate on matters specifically related to their jurisdiction. This does not prevent them from controlling the action of Guardianship Councils in cases provided for by the law itself in Article 148 VII and paragraph 1. According to paragraph 1, 'Children's and Adolescents' Justice' as it is now know, is responsible for:

a) dealing with requests for custody and guardianship,
b) judging suits involving the removal of parental authority or the loss or modification of guardianship or custody,
c) providing authority or consent to marriage,
d) dealing with cases of disagreement between father and mother as to the exercise of parental authority,
e) granting emancipation in the absence of parents according to the terms of civil law,
f) designating a special curator in cases of claims or representation, or other judicial or extrajudicial proceedings in which the interest of a child or adolescent is involved,
g) judging alimony cases,
h) deciding the cancellation, rectification and issuing of birth and death certificates.

Of all the changes introduced by the Act, perhaps the most innovative feature is the creation of Councils on the Child and the Adolescent at the federal, state (provincial) and municipal levels. These Councils, which have equal representation of the government and non-governmental organizations, are endowed with decision-making powers and control functions at all levels. They represent a confirmation from the judiciary of the need for joint effort between State and civil society (Article 88).

These Councils are also responsible for setting policy guidelines in each area, rationalizing and maximizing the operations of welfare programmes. According to Article 91, non-governmental organizations may only operate after registering with the Municipal Council, which communicates the registration to the Guardianship Council and the judicial authority of the respective locality. According to paragraph 1 of Article 91, the Municipal Council may deny registration to organizations that do not have proper constitutions, propose projects which are incompatible with the principles of the law or have unqualified staff. Moreover, according to Article 92, programmes which offer shelter to children and adolescents should adopt principles which are in keeping with the law, such as the preserving family links, allowing participation in community life, etc. Only these Councils (authorized by both the State and civil society) are entitled to control the quality and suitability of service delivery programmes.

In summary, Councils on the Child and the Adolescent formulate the guidelines for service delivery policies; Guardianship Councils deal with cases involving children and adolescents; and the judicial authorities are in charge of punishable offences involving adolescents.

According to Article 131, Guardianship Councils are permanent and autonomous non-jurisdictional institutions commissioned by society to ensure that children's and adolescents' rights as defined by the Act are observed. Article 132 establishes that in each municipality there must be at least one Guardianship Council consisting of five members with a tenure of three years (with the possibility of re-election), which have been elected by local citizens. The responsibilities of Guardianship

Councils lie mainly in dealing with cases where children's or adolescents' rights are threatened or violated (Article 98), or where a child is accused of an act that, if committed by an adolescent, would represent an offence (Article 105). According to the principle of differentiation of judicial functions, Article 137 states that the decisions of the Guardianship Council may only be reviewed by the judicial authority at the request of those who have a legitimate interest in the case.

Another important feature introduced by the Act is remission. This allows the public prosecutor to prevent a case going ahead if it is judged to be inappropriate based on the circumstances and consequences of the act committed, of the adolescent's personality and depending on the level of his or her involvement in the offence (Article 126). This highlights once again the differentiation that is being made within the judiciary. According to Article 128, "measures applied by remission may be judicially reviewed at any time at the express request of the adolescent, of his or her legal representative, or of the public prosecutor".

The new Act has been criticized by some groups, who maintain that the instrument is too advanced for Latin American society. A parallel can be drawn with the argument used against legislation to abolish slavery.

It is more difficult to implement laws that require public participation than to experiment with centralized judicial reform. The experience of implementing this Act has shown that it can play a positive role in helping to reinforce democracy.

The Act is undoubtedly the best interpretation in Latin America of the United Nations theory of full protection. It is now up to the government and people of Brazil to continue to work on what started as a Bill and ended as a social project. Today, non-governmental organizations and those responsible for public policy are working together on the second and third stages of the original strategic plan - the restructuring of institutions and the improvement of service delivery.

From a Latin American perspective, and after the failure of policies handed down by 'groups of experts', the case of Brazil offers a new model for dealing with problems relating to children and adolescents. The challenge lies not in imitating the provisions of the Act, but in using this concrete experience as the basis for discussion. Brazil needs other examples with which to compare its own project of judicial co-operation between governmental and non-governmental organizations. In addition, the rest of Latin America needs to start adapting its legislation to the principles of the theory of full protection, some instruments of which (the Convention) have already become part of national laws.

Imposed and self-imposed isolation, heightened by the language barrier, has separated Brazil culturally and politically from the rest of Latin America for centuries. The removal of the relative isolation of and from Brazil can only come about through Latin American integration in the common search for solutions to real and urgent problems, one of which is the issue of child rights.

Two different tasks appear today as top priorities on the agenda of all those concerned with this issue: to produce legislative changes in keeping with the principles of full protection and, where this has already been done, to defend and reinforce the successes that have been achieved. Whilst legislative reform is a fundamental step, it is only the beginning of a process of improving children's and adolescents' living conditions.

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